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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1964.

No. 984

FELIX FERINA,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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INDEX

Opinions Below 2

Jurisdiction 2

Questions Presented 2

Constitutional Provisions and Statutes Involved 4

Statement 4

Reasons for Granting the Writ—

1. The Bill of Rights Safeguard Against Double Jeopardy Was Intended to Establish a Broad National Policy Against Federal Courts Trying or Punishing a Man a Second Time After Acquittal or Conviction in Any Court of Competent Jurisdiction 12

2. Petitioner Received Sentences Unlawfully Pyramided to Impose on Him Double Punishment for a Single Offense 18

3. The Basic Facts Forming the Foundation for the Two Prosecutions (State and Federal) Were Identical and Acquittal on the State Court Charge Should Preclude the Second Prosecution in the Federal Court under the Doctrine of Equitable Estoppel 26

Conclusion 30

Appendix—

Fifth Amendment United States Constitution A1

Fourteenth Amendment United States Constitution A1

Title 28, Section 2255, U.S.C. A1

18 U.S.C. 1503 ..... A3

18 U.S.C. 371 ..... A4

Rule 35, Federal Rule Criminal Procedure A4

Indictment A5

Judgment and Commitment A9

Motion to Vacate or Correct Illegal Sentence A11
Opinion and Order Overruling Motion to Vacate A38
Opinion, Court of Appeals A45
Judgment, Court of Appeals A54
Information in Lieu of Indictment A55

TABLE OF CASES

Abbate v. *United States*, 359 U.S. 187, 203, 79 S. Ct. 666 .....3, 16, 18, 23

Bartkus v. *People of State of Illinois*, 359 U.S. 121, 165-6, 167-168, 79 S. Ct. 676, 703, 704 .....3, 13, 14, 18

Bell v. *United States*, 349 U.S. 81, 75 S. Ct. 620 22

Blockburger v. *United States*, 284 U.S. 299, 52 S. Ct. 180 .....3, 19

Braverman v. *United States*, 317 U.S. 49, 63 S. Ct. 99 19

Cucci v. *State of Illinois*, 356 U.S. 571, 573-575, 78 S. Ct. 839, 840-841 15

Drummond v. *United States*, 324 U.S. 316, 65 S. Ct. 659, 660 13

Ex parte Snow, 120 U.S. 274, 7 S. Ct. 556, 31 L. Ed. 658 18-19

Ferina v. *United States*, 302 F.2d 95 (8th Cir. 1962) cert. den. sub nom. *Cardarella* v. *United States*, 371 U.S. 819 (1963) 2, 4, 5, 9, 10, 11, 13, 19, 20, 21, 25, 27, 28

Green v. *United States*, 355 U.S. 184, 187, 188, 78 S. Ct. 221 12

Hoag v. *State of New Jersey*, 356 U.S. 464, 468, 78 S. Ct. 829 .....15, 18

Ladner v. *United States*, 358 U.S. 169, 79 S. Ct. 209 22

Malloy v. *Hogan*, 84 S. Ct. 1489 .....3, 15, 16, 17, 18, 25, 30

Murphy v. *Water Front Commission of New York Harbor*, 84 S. Ct. 1594 .....3, 15, 16, 17, 25, 30

Pinkerton v. *United States*, 328 U.S. 640, 643, 66 S. Ct. 1180 22

Sealfon v. *United States*, 332 U.S. 575, 68 S. Ct. 237, 238, 240 ..... 4, 23, 24, 27
United States v. *Lanza*, 260 U.S. 377 3
United States v. *Mason*, 213 U.S. 115, 29 S. Ct. 480 ..... 29, 30
Yates v. *United States*, 355 U.S. 66, 78 S. Ct. 128 3

CONSTITUTIONAL PROVISIONS AND STATUTES

Fifth Amendment to the Constitution of the United States 4, 6, 26
Fourteenth Amendment to the Constitution of the United States 4, 6, 26
Rule 35, Federal Rules of Criminal Procedure 1, 2, 4
Section 371, Title 18, United States Code 4, 9
Section 1503, Title 18, United States Code 4, 19
Section 2255, Title 28, United States Code 1, 2, 4

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To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioner, Felix Ferina, a federal prisoner now in custody in the Fort Leavenworth Penitentiary, respectfully prays that a Writ of Certiorari issue to review the order and judgment of the United States Court of Appeals for the Eighth Circuit in the case of Felix Ferina, Appellant, v. United States of America, Appellee, number 17,685, entered on January 28, 1965, affirming an order and judgment of the United States District Court denying petitioner's alternate motion under 28 U.S.C.A., Sec. 2255 and Fed. R. Crim. P. 35 to vacate or correct illegal sentences.

OPINIONS BELOW

The trial Court filed a memorandum opinion and order which is set out in the Appendix, page A38. The opinion of the Court of Appeals is not yet reported but is set out on pages A45 to A53, inclusive, of the Appendix attached hereto.

The original appeal in this case is reported in *Ferina* v. *United States*, 302 F.2d 95 (8th Cir. 1962), cert den. sub nom. *Cardarella* v. *United States*, 371 U.S. 819 (1963).

JURISDICTION

The jurisdiction of this Court to entertain the instant Petition for Certiorari is based upon Section 1254 (1), Title 28, United States Code. The judgment of the Court of Appeals sought to be reviewed was entered on January 28, 1965, affirming an order of the United States District Court denying Petitioner's alternative motion under 28 U.S.C.A., Sec. 2255 and Fed. R. Crim. P. 35 to vacate or correct illegal sentence. (A true copy of said judgment of the Court of Appeals is set out on page A54 of the Appendix, hereinafter.)

On February 11, 1965, the Court of Appeals entered an order staying the mandate in this case for a period of thirty days from February 17, 1965.

QUESTIONS PRESENTED

Petitioner respectfully submits that the United States Court of Appeals for the Eighth Circuit in its opinion and judgment herein has decided Federal Constitutional and

Statutory questions in a way in conflict with current applicable decisions of this Court, and has so far departed from the accepted and usual course of judicial proceedings as to call for a re-examination of the applicable law and an exercise of the Court's power of supervision. The Questions presented are:

1. Whether some of the more recent decisions of this Court (such as *Malloy* v. *Hogan*, 84 S. Ct. 1489 and *Murphy* v. *Water Front Commission of New York Harbor*, 84 S. Ct. 1594), moving in related fields, may not have impaired or abated the authority of *United States* v. *Lanza*, 260 U.S. 377; *Abbate* v. *United States*, 359 U.S. 187, and *Barktus* v. *Illinois*, 359 U.S. 121, holding double jeopardy is improvidently raised, even if given identical offenses, where their proscription emanates from different State and National sovereigns, so as to call for a new study and reappraisal of the law in this field.

2. Whether under the facts of this case the ruling of the Court of Appeals that conspiracy count IV, although requiring no other or different proof, constituted a separate offense from substantive counts I and II so as to authorize the trial court to assess a separate punishment on count IV to run consecutively to the concurrent sentences under Counts I and II, does not constitute double punishment for a single offense and bring this opinion into conflict with opinions of this Court in *Blockburger* v. *United States*, 284 U.S. 299, 52 S. Ct. 180; *Yates* v. *United States*, 355 U.S. 66, 78 S. Ct. 128, condemning double punishment for a single offense.

3. Whether acquittal in state court, where the basic facts forming the foundation of both the state Court prosecution and the later Federal Court Prosecution are identical (Appendix, pages A5 to A8, A55), should not preclude

the second prosecution although the charge be different and the evidence be more elaborate and whether said ruling does not conflict with the opinion of this Court in *Sealfon* v. *United States*, 332 U.S. 575, 68 S. Ct. 237, 238, 240.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Fifth Amendment to the Constitution of the United States.

Fourteenth Amendment to the Constitution of the United States.

Section 1503, Title 18, United States Code.

Section 371, Title 18, United States Code.

Rule 35, Federal Rules of Criminal Procedure.

Section 2255, Title 28, United States Code.

The Constitutional provisions and Statutes involved, so far as pertinent, are set out in the appendix, *infra*, pp. A1-A4.

STATEMENT

The Court of Appeals summarized the charge as follows (*Ferina* v. *United States*, 302 F.2d 95, l.c. 97, 98):

> "On July 14th, 1960, a grand jury for the Western District of Missouri returned the indictment in the present case. In Count I of the indictment the defendants Cardarella and Ferina were charged with injuring Sheetz because of his having testified as a witness before the Nebraska federal grand jury. In Count II the defendants Cardarella and Ferina were charged with endeavoring to intimidate Sheetz from being a witness in the trial of Biase to be had in Nebraska. In Count III Carlton A. Young was charged with end voring to intimidate and influence

Sheetz from being a witness in the same trial. In Count IV Biase, Cardarella, Ferina and Young were charged with conspiring to injure Sheetz for his having testified as a witness before the Nebraska federal grand jury and to intimidate him from being a witness at the impending trial of Biase.

"Counts I, II, and III were based on Section 1503, Title 18 United States Code.

* * *

"Count IV is based upon the conspiracy statute, Section 371, Title 18 United States Code."

Subsequently Petitioner was tried twice in the State Court upon a charge of assault upon Sheetz with intent to kill. The first trial resulted in a hung jury and the second trial resulted in an acquittal 302 F.2d, l.c. 108. Thereafter this case was brought to trial in the Federal Court resulting in Petitioner being convicted on Counts I, II and IV. He was sentenced to serve five years in the penitentiary on Counts I and II, to run concurrently and to serve five years in the penitentiary on Count IV to run consecutively to the concurrent sentences on Counts I and II, or a total sentence of ten years.

Upon Appeal the Court of Appeals affirmed (302 F.2d 95) and this Court denied Certiorari. Sub. Nom. *Cardarella* v. *United States,* 371 U.S. 819.

On April 27, 1964, Petitioner filed this motion which the trial Court denied and on appeal the Court of Appeals affirmed, 302 F.2d 95.

At the trial of this court, beginning April 17, 1961, petitioner challenged the jurisdiction of United States District Court in this proceeding based on the same charge upon which he had previously stood trial and been acquitted in the State Court, on the grounds it subjected

him to double jeopardy in violation of rights guaranteed him under the Fifth and Fourteenth Amendments to the Constitution of the United States (Exhibit A to Ferina's Motion for Judgment of Acquittal in this action). The trial court herein overruled and denied such challenge to its jurisdiction.

The following federal agents and employees testified for the prosecution in both the State Court Trials and Federal Court: Bernard A. Theisen, Jr., Agent, Federal Bureau of Narcotics (Exhibit A, No. 12; Tr. 3-40); Claude A. Follmer, Federal Agent, Bureau of Narcotics (Exhibit A, No. 7; Tr. 267-275) and Morris Samuel Clark, Special Agent Federal Bureau of Investigation Laboratory (Exhibit A, No. 8; Tr. 284-292).

The following other witnesses testified for the prosecution in both the State Court trials and Federal Court: Robert W. Sanders (Exhibit A, No. 1; Tr. 205-214); Milton Roscoe, Jr. (Exhibit A, No. 3; Tr. 222-228); Harry B. Hicks (Exhibit A, No. 5; Tr. 223-246) and Patrick J. Allegi (Exhibit A, No. 6; Tr. 275-284).

In addition to the above witnesses, Kenneth Bruce Sheetz (Exhibit A, No. 11; Tr. 99-182) testified for the prosecution at both trials. Sheetz had a long criminal record, 302 F.2d, l.c. 98. In September, 1959, Sheetz was arrested for the purchase and sale of narcotics (Tr. 101, 157, 158). He thereafter traveled with narcotic agent Theisen as a stool pigeon in the service of the Federal Bureau of Narcotics and later pleaded guilty to the sale of narcotics as charged (Tr. 105), but at the time of trial he had not been sentenced and was not incarcerated (Tr. 105), but was in protective custody of and under control and dominance of the federal authorities (Tr. 99, 161).

Petitioner contends that the State Court prosecution through two trials was in reality and effect a federal prosecution and was planned, dominated and controlled by Federal Officers. When the state prosecution failed and appellant was acquitted, the same Federal Officers, with the same witnesses and same evidence, then caused him to be tried in Federal Court for the same identical alleged assault.

The Federal authorities used the State Court trial as a dress rehearsal and witness training exercise. In Federal Court, the government then put on as its own witnesses two key state court witnesses of defendant for its effect on the jury.

The Federal Bureau of Narcotics was called immediately on the morning of the shooting by the Kansas City Police and collaborated with the Kansas City Police Department from the beginning. Captain Flavin, Commander of the Intelligence Unit of the Police Department, called Supervisor Smith of the Federal Bureau of Narcotics on the morning of the shooting and waited for him and Federal Narcotics Agent Follmer to come out from their office to join him in going to the hospital to interview Sheetz (Tr. 187, 184, 267).

After that interview, Captain Flavin went with Narcotics Supervisor Smith to the Police Headquarters where they secured a bunch of pictures and took them back to the hospital that evening where Sheetz allegedly identified Appellant and Cardarella (Tr. 186).

On the very day of the shooting, June 20, 1960, Narcotics Agent Follmer received from the Kansas City Police all of the articles gathered by the police from the scene of the shooting and vicinity thereof, packaged them and forwarded them to the F.B.I. Laboratory in Wash-

ington for study and analysis of such articles and returned them to Agent Follmer with a report of such analysis (Tr. 269, 272). Officer Follmer then returned these articles to the Police for use in the State Court and later got them back for use in the trial in this case in the United States District Court (Tr. 267-272).

Mr. Morris Samuel Clark, the laboratory technician of the F.B.I. laboratory in Washington who examined these articles and made the report, testified for the prosecution in the State Court and also in the Federal Court (Tr. 284, 285; Exhibit A, Motion to Vacate).

A statement of Sheetz taken on a tape recording by the Federal Bureau of Narcotics was kept in possession of Supervisor Smith of the Narcotics Bureau, who actively participated in the Federal Court trial (Tr. 123, 124); upon request of Defendants, he produced the tape recording and played it during a recess of the Federal Court before counsel and the Court (Tr. 123, 124).

The Federal Bureau of Narcotics dominated the State Court trial as it did the Federal Court trial.

Officer Robert W. Sanders of the Kansas City, Missouri Police Department, was the first officer to talk to Sheetz after he was shot; on the same day, Officer Sanders filed a written report in the police department wherein he quoted Sheetz as saying: "He first stated it was two white men and then said it was two colored males with white handkerchiefs over their faces," but at all the trials this officer testified Sheetz did not say who shot him.

The only evidence in the State Court by an eyewitness to the assault was that of Sheetz, who testified that petitioner was accompanied by one Anthony Cardarella who, he testified, actually fired the shots into Sheetz (Tr.

145, 172). All other witnesses who saw the assailants of Sheetz leaving the scene denied Ferina and Cardarella were the ones (302 F.2d, l.c. 99, 100).

The alleged overt acts in the conspiracy count IV were, in substance, as follows (Tr. 443-444):

1. That in furtherance of the conspiracy between April 1, 1960 and April 30, 1960, Carlton A. Young held various conversations with Kenneth Bruce Sheetz relating to the testimony of, and availability of Sheetz as a witness in the Biase case pending in the United States District Court in Omaha.

There was no proof of this alleged overt act and the trial court directed a verdict for defendant Carlton A. Young at the close of the Government's case (Tr. 303).

2. That in furtherance of the conspiracy on or about June 20, 1960, the defendants Anthony Cardarella and Felix Ferina did break open a door of the residence of Sheetz at 4501 Michigan Avenue, Kansas City, Missouri, and did enter such residence.

The fingerprints found around the door broken open were admittedly not those of Ferina or Cardarella (Tr. 428, 429) and none of the guns or other articles found in the vicinity were shown to be connected with Ferina or Cardarella (Tr. 254, 248, 252, 253, 284-290, 303, 304, 302 F.2d, l.c. 100). The trial court did not submit in its charge any issue as to whether Ferina or Cardarella broke open the door to the Sheetz resident (Tr. 432-474).

3. That in furtherance of said conspiracy and to effect the object thereof in Kansas City, Missouri, on or about June 20, 1960, Anthony Cardarella, in the company of Felix Ferina, fired six shots from a .38 special caliber revolver, with the intent and purpose of killing Kenneth Bruce Sheetz, all in violation of 18 U.S.C. 371.

The last or third alleged overt act was the only one submitted in the Court's charge. Cardarella and Ferina stood alone before the Court on this issue as there was no evidence connecting Biase or Young. The Court of Appeals said (302 F.2d, l.c. 104): "The charges against Ferina and Cardarella and their convictions on those charges were based upon their own acts."

The number three overt act submitted was the same alleged crime upon which petitioner had been tried and acquitted in the State Court and was the same alleged crime submitted under Counts I and II of the indictment herein. Such facts are the basis for petitioner's claims of double jeopardy, illegal and excessive sentence, *res judicata* and collateral estoppel.

The prosecution attempted to connect Biase in Omaha, Nebraska, with Ferina and Cardarella in Kansas City through Carlton A. Young (Tr. 40-98), but wholly failed to show any such connection at either end of the line and the Court directed a verdict for defendant Young at the close of the Government's evidence (Tr. 463). On appeal, the Court of Appeals reversed the conviction of defendant Anthony J. Biase outright for failure of the Government to prove a submissible case against him, 302 F.2d 95.

There is no evidence in this record that Ferina or Cardarella ever saw, communicated with or knew such a person as Anthony Biase existed prior to their arrest after June 20, 1960, or had any knowledge or notice that there was such prosecution going on in the United States Court in Nebraska. Their conviction hangs on the single tenuous thread of the testimony of Sheetz as to an alleged statement of someone (Tr. 172, 114) (we submit it was Cardarella as explained under Point II of our reasons for grant-

ing the writ) at the time of the shooting: "Here's something from Tony." (Tr. 114, 162, 131).

Sheetz first said and maintained through the day that he wasn't ready to tell who shot him (Tr. 261, 139). He identified Cardarella and Ferina as his assailants that evening (Tr. 139) but did not mention the alleged statement, "Here's something from Tony" until a later time, shortly before the State Court trial (Tr. 114).

Since Cardarella's first name was Anthony for which "Tony" is the common nickname, it is petitioner's contention that the most reasonable construction of such language would be that Cardarella was referring to himself and not to Biase whom he did not know. There could be no secret meaning of such words between Cardarella and Sheetz as they had never talked together (Tr. 115, 163, 164).

In the charge, the trial judge said (Tr. 456):

> "The one word, one thing that links these people together, if it does, when the last shot was fired into him is the statement, "This is from Tony.'"

The Court of Appeals likewise accepts Sheetz' testimony of this alleged sentence as alone and by itself linking petitioner and Cardarella to Biase and also revealing knowledge and purpose making it a Federal offense. This is admittedly the only possible link (302 F.2d, l.c. 104).

Sheetz' identification of petitioner is based on his testimony that he stepped from the sunlight from out-of-doors into the fairly dark inside of the house and saw a gun and two men all in one glimpse of about one-fifth of a second or a little more before he was shot (Tr. 127, 129, 130, 131, 132, 133, 134, 135, 136, 141, 146, 147, 171, 172). He testified Appellant was wearing a dark mask (Tr. 113,

168). That one glimpse was the only view he claims to have had of Appellant Ferina (Tr. 172).

Sheetz testified that in addition to Anthony (Tony) Biase he knew other persons by the name of "Tony", perhaps three or four (can't be sure) (Tr. 104), but that he had no trouble with any other Tonys. He thereafter admitted he had never had any difficulty with either Cardarella or Ferina; that he had only a speaking acquaintance with each and had never had a conversation with either (Tr. 115, 163, 164).

There is absolutely no evidence in this record that Ferina or Cardarella had ever had any connection with or interest in the narcotics traffic which could be a motive or reason for wanting to prevent Sheetz from testifying against Biase in Nebraska. There is absolutely no evidence of any motive for Ferina or Cardarella to want to kill Sheetz for any reason, to prevent his testifying against a man they did not know and concerning a matter unknown to them and with which they had no connection or interest.

REASONS FOR GRANTING THE WRIT

1. The Bill of Rights Safeguard Against Double Jeopardy Was Intended to Establish a Broad National Policy Against Federal Courts Trying or Punishing a Man a Second Time After Acquittal or Conviction in Any Court of Competent Jurisdiction.

In *Green* v. *United States*, 355 U.S. 184, 187, 188, 78 S. Ct. 221, the Court said (l.c. 223):

> "The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources

> and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.
>
> "[3] In accordance with this philosophy it has long been settled under the Fifth Amendment that a verdict of acquittal is final ending a defendant's jeopardy, and even when 'not followed by any judgment, is a bar to a subsequent prosecution for the same offence.' United States v. Ball, 163 U.S. 662, 671, 16 S.Ct. 1192, 1195, 41 L.Ed. 300."

Petitioner was tried twice in the Missouri State Court on a charge of felonious assault on Sheetz with a gun loaded with gunpowder and leaden ball. The first trial resulted in a hung jury and the second trial resulted in an acquittal (302 F.2d, l.c. 108). Federal officers and witnesses participated in force in the state court trials and used such experience as a dress rehearsal and training ground for the Federal Court trial where the Government adopted as its own and, for strategic purposes, called as witnesses and put on the stand petitioner's key state court defense witnesses, Ann Mae DeWitt and Detective Sergeant Robert J. Kelly, Jr.

Under such circumstances the state court trials should be binding on Federal authorities as a Federal prosecution. *Drummond* v. *United States*, 324 U.S. 316, 65 S. Ct. 659, 660; see dissenting opinion of Mr. Justice Brennan (concurred in by the Chief Justice and Mr. Justice Douglas) in *Bartkus* v. *People of State of Illinois*, 359 U.S. 121, 165-6, 167-168, 79 S. Ct. 676, 703, 704. Unless the supervisory powers of this Court are used to protect against such harassment, we are likely to see springing up a new

practice and doctrine partaking of many of the attributes of the condemned "silver platter" doctrine.

In the case of *Bartkus* v. *People of State of Illinois*, 359 U.S. 121, 79 S. Ct. 676, in the dissenting opinion of Mr. Justice Brennan, concurred in by the Chief Justice and Mr. Justice Douglas, it was said (l.c. 703):

> "I think that the record before us shows that the extent of participation of the federal authorities here constituted this state prosecution actually a second federal prosecution of Bartkus."

(l.c. 705:)

> "Of course, cooperation between federal and state authorities in criminal law enforcement is to be desired and encouraged, for cooperative federalism in this field can indeed profit the Nation and the States in improving methods for carrying out the endless fight against crime. But the normal and healthy situation consists of state and federal officers cooperating to apprehend lawbreakers and present the strongest case against them at a single trial, be it state or federal. Cooperation in order to permit the Federal Government to harass the accused so as to deny him his protection under the Fifth Amendment is not to be tolerated as a legitimate requirement of federalism. The lesson of the history which wrought the Fifth Amendment's protection has taught us little if that shield may be shattered by reliance upon the requirements of federalism and state sovereignty to sustain this transparent attempt of the Federal Government to two tries at convicting Bartkus for the same alleged crime. What happened here was simply that the federal effort which failed in the federal courthouse was renewed a second time in the state courthouse across the street. Not content with the federal jury's resolution of conflicting testimony in Bartkus' favor, the federal officers engineered this second prosecution and on the second

> try obtained the desired conviction. It is exactly this kind of successive prosecution by federal officers that the Fifth Amendment was intended to prohibit."

We submit this present case under its facts conflicts with the opinion of this Court in the case of *Hoag* v. *State of New Jersey,* 356 U.S. 464, 468, 78 S. Ct. 829, where it is said (l.c. 833):

> "In the last analysis, a determination whether an impermissible use of multiple trials has taken place cannot be based on any overall formula. Here, as elsewhere, 'The pattern of due process is picked out in the facts and circumstances of each case.' Brock v. State of North Carolina, 344 U.S. 424, 427-428, 73 S.Ct. 349, 350-351, 97 L.Ed. 456."

In the Federal Court petitioner was forced to submit to a third trial on the issue of felonious assault on Sheetz involving the same witnesses and testimony. The violently prejudicial evidence of the Biase narcotics prosecution in Omaha and Sheetz's connection with it was introduced in the State Court in an attempt to show motive and in the Federal Court to show motive and also supply a necessary element of federal jurisdiction. Petitioner was thus forced to run the gantlet three times in violation of the current judicial thinking as to the real purpose of the constitutional provision against double jeopardy. See dissenting opinions of Mr. Chief Justice Warren and Mr. Justice Douglas in which Mr. Justice Black concurred in the case of *Hoag* v. *State of New Jersey,* 356 U.S. 464, 473-480, 78 S. Ct. 829, 835-839; dissenting opinion of Mr. Justice Douglas, in which the Chief Justice, Mr. Justice Brennan and Mr. Justice Black concurred in *Ciucci* v. *State of Illinois,* 356 U.S. 571, 573-575, 78 S. Ct. 839, 840-841; *Malloy* v. *Hogan,* 84 S. Ct. 1489; *Murphy* v. *Waterfront Commission of New York Harbor,* 84 S. Ct. 1594.

In the case of *Abbate* v. *United States*, 359 U.S. 187, 203, 79 S. Ct. 666. Mr. Justice Black, in a dissenting opinion concurred in by the Chief Justice and Mr. Justice Douglas, said (l.c. 675):

> "I am also not convinced that a State and the Nation can be considered two wholly separate sovereignties for the purpose of allowing them to do together what, generally, neither can do separately. In the first place, I cannot conceive that our States are more distinct from the Federal Government than are foreign nations from each other. And it has been recognized that most free countries have accepted a prior conviction elsewhere as a bar to a second trial in their jurisdiction. In the second place, I believe the Bill of Rights' safeguard against double jeopardy was intended to establish a broad national policy against federal courts trying or punishing a man a second time after acquittal or conviction in any court. It is just as much an affront to human dignity and just as dangerous to human freedom for a man to be punished twice for the same offense, once by a State and once by the United States, as it would be for one of these two Governments to throw him in prison twice for the offense."

The old doctrine of separate sovereignties—State and Federal—has been so far eroded in recent years as to call for a new appraisal. Recent decisions of this Court have forced a shift of State Courts to Federal standards in state cases, such as appointment of counsel as a fundamental right of the accused, obligatory exclusion of evidence obtained by unreasonable search and seizure, privilege against self-incrimination is protected against both State and Federal prosecutions. *Malloy* v. *Hogan*, 84 S. Ct. 1489; *Murphy* v. *Waterfront Commission of New York Harbor*, 84 S. Ct. 1594.

In the case of *Murphy* v. *Waterfront Commission of New York*, 84 S. Ct., l.c. 1603-1609, this Court refused to follow the "separate sovereignty" theory of the limits of protection against self-incrimination. The court stressed the importance of preserving the constitutional privilege against self-incrimination, saying (l.c. 1597):

> "This has become especially true in our age of 'cooperative federalism,' where the federal and state governments are waging a united front against many types of criminal activity.
>
> "Respondent contends, however, that we should adhere to the 'established rule' that the constitutional privilege against self-incrimination does not protect a witness in one jurisdiction against being compelled to give testimony which could be used to convict him in another jurisdiction."

The Court thereafter said (l.c. 1608):

> "The foregoing makes it clear that there is no continuing legal vitality to, or historical justification for, the rule that one jurisdiction within our federal structure may compel a witness to give testimony which could be used to convict him of a crime in another jurisdiction."

We submit that for similar reasons, the "separate sovereignty" theory should no longer be applied to the defense of double jeopardy.

In the case of *Malloy* v. *Hogan*, 84 S. Ct. 1489, the Court said (l.c. 1495):

> "What is accorded is a privilege of refusing to incriminate one's self, and the feared prosecution may be by either federal or state authorities. Murphy v. Waterfront Comm'n, ante. It would be incongruous to have different standards determine the validity of a claim of privilege based on the same

> feared prosecution, depending on whether the claim was asserted in a state or federal court. Therefore, the same standards must determine whether an accused's silence in either a federal or state proceeding is justified."

We submit the reasoning and views of the members of this Court appear to have now run full cycle and have now become crystallized against the "separate sovereignty" theory of the past and in accord with the view of Mr. Justice Douglas (concurred in by Mr. Justice Black) in a dissenting opinion in *Hoag* v. *State of New Jersey*, 356 U.S. 464, 477, 478, 78 S. Ct. (l.c. 837):

> "We recently stated in Green v. United States, 355 U.S. 184, 190, 78 S.Ct. 221, 225, 2 L.Ed. 2d 199, that by virtue of the constitutional protection against double jeopardy an accused can be forced to 'run the gantlet' but once on a charge. That case, involving a federal prosecution, provides for me the standard for every state prosecution as well, and by that standard this judgment of conviction should be reversed."

This appears now to be the majority view of this Court. *Malloy* v. *Hogan*, 84 S. Ct. 1489, 1495, *supra*.

See to like effect the dissenting opinion of Mr. Justice Black, concurred in by the Chief Justice and Mr. Justice Douglas in *Abbate* v. *United States*, 359 U.S. 187, 203, 79 S. Ct. 666, 675, quoted above herein, and the dissenting opinion of Mr. Justice Brennan, concurred in by the Chief Justice and Mr. Justice Douglas, in *Bartkus* v. *People of State of Illinois*, 359 U.S. 121, 79 S. Ct. 676, l.c. 703 and 705.

2. Petitioner Received Sentences Unlawfully Pyramided to Impose on Him Double Punishment for a Single Offense.

Petitioner's right to be free of double or multiple punishments for one offense is beyond question. *Ex Parte*

Snow, 120 U.S. 274, 7 S. Ct. 556, 31 L. Ed. 658; *Braverman* v. *United States*, 317 U.S. 49, 63 S. Ct. 99.

In the case of *Blockburger* v. *United States*, 284 U.S. 299, 304, 52 S. Ct. 180, the Court laid down this test (l.c. 182):

> "The applicable rule is that, where the act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one is whether each provision requires proof of an additional fact which the other does not. Gavieres v. United States, 220 U.S. 338, 342, 31 S.Ct. 421, 55 L.Ed. 489."

Here the substantive counts and the conspiracy count were sustained by exactly the same evidence, and neither required additional evidence (302 F.2d, l.c. 104).

Here the substantive counts charged interference with a Government witness in a pending proceeding in a Federal Court under 18 U.S.C.A., Sec. 1503 (Tr. 439-444).

The essential elements of such offense is stated in the earlier appeal of this case in *Ferina* v. *United States*, 302 F.2d 95, as follows (l.c. 102):

> "[2, 3] The assault made upon Sheetz by Ferina and Cardarella, standing by itself, would not constitute a federal offense under Section 1503, Title 18 United States Code. In order for the assault to have constituted an offense under that Section, it must have been made with knowledge on the part of the assailants of Sheetz' past conduct or expected conduct in connection with the federal narcotics charge then pending against Biase and either for the purpose of punishing him for his past conduct in relation thereto or intimidating him in connection with his expected conduct in relation thereto."

The alleged assault here occurred in Kansas City, Missouri, and the federal narcotics charge against Biase was pending in his home town of Omaha, Nebraska, cities 219 miles apart. The Government was unable to produce any evidence that Ferina or Cardarella had ever had any connection with or interest in narcotics. The Government was unable to produce any evidence that either Ferina or Cardarella had ever been in Omaha or had ever heard of Biase or the proceeding pending against him in that city. The Government undertook to bridge this gap through defendant, Carlton A. Young, of Kansas City. The Government failed so completely in this that at the close of the Government evidence the trial court directed a verdict for Young and he was discharged. On appeal the Court of Appeals held this evidence was insufficient to make a case against Biase and reversed his conviction outright (302 F.2d 95). In other words, the Carlton Young bridge failed to reach either bank.

In the original appeals the Court of Appeals said (302 F.2d, l.c. 104):

> "No connection was established between Carlton A. Young and Biase, Ferina and Cardarella."

The trial court was forced by the evidence to limit the jury in his charge as follows (Tr. 456):

> "The one word, one thing that links these people together, if it does, when the last shot was fired into him is the statement, 'This is from Tony.' "

The Court of Appeals recognized that this weak link was the full limit the evidence would justify, but held it was sufficient to make a submissible case of obstruction of justice. 302 F.2d, l.c. 102, 103.

Here the evidence was that Ferina and Cardarella were together inside Sheetz' house at the time of the assault but that Cardarella did the shooting and Cardarella was in the doorway when Sheetz claims to have heard the words, "This is from Tony." (Tr. 145, 172, 114, 162, 131). In the original case (302 F.2d 95), the Court of Appeals said one of the two spoke such words. Sheetz had previously testified in both State trials that the smaller of the two (Cardarella) was the only one in sight when he heard such words which he re-affirmed on cross-examination in this case (Tr. 172, 173). Sheetz at no time said Ferina spoke such words and as Cardarella was the only one in sight at the time we believe the only reasonable inference is that Cardarella spoke such words. We submit Ferina was found guilty solely because of the alleged words and acts of Cardarella. This evidence was the sole basis of the conviction of Ferina not only on the substantive charges but also on the conspiracy charge. It took the same evidence of partnership in crime to convict Ferina on the substantive charges as on the conspiracy charge. Both the trial court and the Court of Appeals found this sufficient to sustain both substantive and conspiracy charges. Applying the test of the Blockburger case, we confidently believe this demonstrates that Ferina was convicted of a single offense and could lawfully be given only one sentence.

In discussing the substantive counts I and II of the indictment the Court of Appeals said (302 F.2d, l.c. 103):

> "If the spokesman for the two assailants had stated at the time of the assault, 'Here's something for you because you testified against Tony Biase before the grand jury and because you expect to testify against him at his trial,' it could not be seriously contended that such evidence would not be sufficient

to establish the motive and reason for the assault. In view of the surrounding circumstances, the jury could properly find that the statement in question conveyed what was in substance the same message, and the meaning of the message was known to both the assailants and Sheetz; and that since the assailants knew the meaning of the message they knew of the past conduct or expected conduct of Sheetz in relation to Tony Biase.

"The evidence is sufficient to sustain the convictions of Ferina and Cardarella under Counts I and II of the indictment."

This clearly shows that it took the same facts to make a case on the substantive counts that are required to make a case on the Conspiracy Count IV, thereby demonstrating Counts I, II and IV charge one and the same identical offense.

We submit the opinion of the Court of Appeals is in conflict with the case of *Ladner* v. *United States,* 358 U.S. 169, 79 S. Ct. 209, holding that wounding two federal officers by a single discharge of a shotgun would constitute but a single offense. In that case one additional item of evidence would be required to show two officers were struck instead of only one.

In the case of *Bell* v. *United States,* 349 U.S. 81, 75 S. Ct. 620, the Court held transportation of two women, on the same trip and in the same vehicle in violation of the Mann Act, constituted a single offense.

In the case of *Pinkerton* v. *United States,* 328 U.S. 640, 643, 66 S. Ct. 1180, the Court said (l.c. 1182):

"There are, of course, instances where a conspiracy charge may not be added to the substantive charge. One is where the agreement of two persons is necessary for the completion of the substantive crime and there

> is no ingredient in the conspiracy which is not present in the completed crime. See United States v. Katz, 271 U.S. 354, 355, 356, 46 S.Ct. 513, 514, 70 L.Ed. 986; Gebardi v. United States, 287 U.S. 112, 121, 122, 53 S.Ct. 35, 37, 77 L.Ed. 206, 84 A.L.R. 370."

We submit that describes the exact situation here and the opinion of the Court of Appeals to the contrary is in conflict with the Pinkerton decision of this Court.

In the case of *Abbate* v. *United States*, 359 U.S. 187, 79 S. Ct. 666, after writing the majority opinion Mr. Justice Brennan filed a memorandum in which he said (l.c. 674):

> "The holding of the Court In re Nielsen, 131 U.S. 176, 9 S. Ct. 672, 33 L. Ed. 118, establishes the governing principle. The defendant in that case, a Mormon with more than one wife, had been convicted of violating a congressional statute, applicable to the territory of Utah, which prohibited males from cohabiting with more than one woman. Subsequently he was prosecuted and convicted of adultery in violation of another congressional statute, the second prosecution being based on the same acts as the prior conviction. Despite the fact that it was necessary to prove a fact in the second prosecution not necessary for the first conviction, i.e., that the defendant was married to another woman, and that a different federal interest was protected by each statute, the Court held that the second prosecution unconstitutionally put the defendant twice in jeopardy for the same offense."

We submit these cases demonstrate that for two charges to be "identical" it is meant only that proof of no essential (not merely evidentiary) fact is necessary in one and not in the other.

In the case of *Sealfon* v. *United States*, 332 U.S. 575, 576, 68 S. Ct. 237, the Court said (l.c. 238):

"This case presents the question whether an acquittal of conspiracy to defraud the United States precludes a subsequent prosecution for commission of the substantive offense, on the particular facts here involved."

The Court further said (68 S. Ct., l.c. 240):

"Petitioner was the only one on trial under the conspiracy indictment. There was no evidence to connect him directly with anyone other than Greenberg. Only if an agreement with at least Greenberg was inferred by the jury could petitioner be convicted. And in the only instruction keyed to the particular facts of the case the jury was told that petitioner must be acquitted if there was reasonable doubt that he conspired with Greenberg. Nowhere was the jury told that to return a verdict of guilty it must be found that petitioner was a party to a conspiracy involving not only Greenberg but the Baron Corporation as well. Viewed in this setting, the verdict is a determination that petitioner, who concededly wrote and sent the letter, did not do so pursuant to an agreement with Greenberg to defraud.

[5] So interpreted, the earlier verdict precludes a later conviction of the substantive offense. The basic facts in each trial were identical. As we read the records of the two trials, petitioner could be convicted of either offense only on proof that he wrote the letter pursuant to an agreement with Greenberg. Under the evidence introduced, petitioner could have aided and abetted Greenberg in no other way. Indeed, respondent does not urge that he could. Thus the core of the prosecutor's case was in each case the same: the letter, and the circumstances surrounding it and to be inferred from it, and the false invoices. There was, of course, additional evidence on the second trial adding detail to the circumstances leading up to the alleged agreement, petitioner's participation therein, and what he may have got out of it. But at most this evidence only

made it more likely that petitioner had entered into the corrupt agreement. It was a second attempt to prove the agreement which at each trial was crucial to the prosecution's case and which was necessarily adjudicated in the former trial to be non-existent. That the prosecution may not do.

Reversed."

The facts of that case are strikingly similar to the facts in this case. Here there was no evidence to connect petitioner to anyone other than Cardarella. The trial court directed a verdict for defendant Carlton A. Young and the Court of Appeals reversed outright as to defendant Biase (302 F.2d, l.c. 104).

Here the only evidence was that Ferina was present with Cardarella when the latter shot Sheetz. Ferina was not the principal actor. There is absolutely no evidence Ferina made any threatening gestures or spoke the words "this is from Tony" or said anything threatening. Dependent on actions of Ferina, there was no assault and no words spoken to show any knowledge of the pending Biase prosecution in the Federal Court in Omaha. Had Ferina been alone and acted as he did there would have been neither an assault with a deadly weapon nor any intimation whatever that the Omaha proceeding had anything to do with his being there. Under the circumstances Ferina could not have committed the alleged crime as described in the evidence by himself without the presence of Cardarella.

In summary, we submit that after a gradual approach in recent years this Court in the cases of *Malloy* v. *Hogan*, 84 S. Ct. 1489, and *Murphy* v. *Waterfront Commission of New York Harbor*, 84 S. Ct. 1594, has applied the Fourteenth Amendment to state court procedures so as to bring such procedures fully up to federal standards, and under its supervisory power is holding the state courts to federal

standards. In the Murphy case the Court struck down the theory of "separate sovereignties" as to the right of immunity from self-incrimination. We believe this has sounded the death-knell of the "separate sovereignty" theory as to double jeopardy also. The Federal and State Courts are no longer separate systems but in fact constitute one single system of jurisprudence bound to the same standards and both subject to the final supervision of this Court.

We do not see how it can be seriously contended that following a state court trial, dominated by federal officers and witnesses, a second trial of exactly the same issues in a federal court does not constitute "double jeopardy" within the meaning and purpose of the Fifth and Fourteenth Amendments to the Constitution of the United States.

3. The Basic Facts Forming the Foundation for the Two Prosecutions (State and Federal) Were Identical and Acquittal on the State Court Charge Should Preclude the Second Prosecution in the Federal Court under the Doctrine of Equitable Estoppel.

We have pointed out under points 1 and 2 of these Reasons For Granting the Writ that the basic facts forming the foundation of both the State Court prosecution and the Federal Court prosecution were identical. We have also pointed out that in both trials the same witnesses testified to such basic facts. The same federal officers and witnesses participated fully in both trials.

It is true the charges were different, as the State court charge was assault with intent to kill, while the Federal Court charge was assault for the purpose of influencing a federal witness. Nevertheless, we believe it may safely be said the evidence in both trials was essentially the same since the only additional evidence in the Federal

Court was offered for the purpose of connecting defendants, Carlton A. Young and Anthony Biase. The failure of such evidence is evidenced by the directed verdict for Young at the close of the Government's evidence and the outright reversal as to Biase by the Court of Appeals (302 F.2d, l.c. 104).

The Court of Appeals said in this case (302 F.2d 104): "No connection was established between Carlton A. Young and Biase, Ferina and Cardarella. * * * The charges against Ferina and Cardarella and their convictions on those charges were based upon their own acts."

The same evidence as to the Biase narcotics prosecution in Omaha and the alleged statement of Cardarella "this is from Tony" was admitted in the State Court to show motive and in the Federal Court to show motive and create Federal Jurisdiction under the Obstruction of Justice Statute (302 F.2d, l.c. 103). The Federal Court trial was in reality a re-run of the State Court trial with the same witnesses and same evidence.

We submit the opinion of the Court of Appeals in this case is in conflict with the decision of this Court in the case of *Sealfon* v. *United States*, 332 U.S. 575, 68 S. Ct. 237, which holds:

> "This case presents the question whether an acquittal of conspiracy to defraud the United States precludes a subsequent prosecution for commission of the substantive offense, on the particular facts here involved."

(l.c. 240:)

> "Petitioner was the only one on trial under the conspiracy indictment. There was no evidence to connect him directly with anyone other than Green-

berg. Only if an agreement with at least Greenberg was inferred by the jury could petitioner be convicted. And in the only instruction keyed to the particular facts of the case the jury was told that petitioner must be acquitted if there was reasonable doubt that he conspired with Greenberg. Nowhere was the jury told that to return a verdict of guilty it must be found that petitioner was a party to a conspiracy involving not only Greenberg but the Baron Corporation as well. Viewed in this setting, the verdict is a determination that petitioner, who concededly wrote and sent the letter, did not do so pursuant to an agreement with Greenberg to defraud.

[5] So interpreted, the earlier verdict precludes a later conviction of the substantive offense. The basic facts in each trial were identical. As we read the records of the two trials, petitioner could be convicted of either offense only on proof that he wrote the letter pursuant to an agreement with Greenberg. Under the evidence introduced, petitioner could have aided and abetted Greenbervg in no other way. Indeed, respondent does not urge that he could. Thus the core of the prosecutor's case was in each case the same: the letter, and the circumstances surrounding it and to be inferred from it, and the false invoices. There was, of course, additional evidence on the second trial adding detail to the circumstances leading up to the alleged agreement, petitioner's participation therein, and what he may have got out of it. But at most this evidence only made it more likely that petitioner had entered into the corrupt agreement. It was a second attempt to prove the agreement which at each trial was crucial to the prosecution's case and which was necessarily adjudicated in the former trial to be nonexistent. That the prosecution may not do.

Reversed."

Here there was no evidence to connect Ferina with anyone other than Cardarella (302 F.2d, l.c. 104). Only if

Ferina was found to be present with Cardarella when Cardarella shot Sheetz and Cardarella said: "This is from Tony," could Ferina be found guilty in either the State Court or Federal Court. The Federal Court trial was a second attempt to prove the agreement of Ferina to cooperate with Cardarella in an assault on Sheetz for the claimed purpose of influencing Sheetz as a federal witness.

Here there was no mystery as to what was determined by the verdict in the State Court, to-wit: that petitioner did not knowingly and jointly cooperate with Cardarella in making an attack on Sheetz on the occasion alleged. That alleged single overt act was the "core of the prosecutor's case." That question was determined in petitioner's favor with pinpointed precision. The Government in this case should have been prohibited from offering evidence which, if believed, would lead to the conclusion that petitioner participated in the alleged assault on Sheetz on the occasion alleged.

In the case of *United States* v. *Mason,* 213 U.S. 115, 29 S. Ct. 480, the Court said (l.c. 482):

> "The murder in question, if committed at all, was, as a distinct offense, a crime against the state; and after the defendants were acquitted of that crime by the only tribunal that had jurisdiction of it *as an offense against the state,* it is to be taken that no such crime of murder as charged in the indictment was in fact committed by them. If this be not so, it follows that, notwithstanding the lawful acquittal of the defendants by the only tribunal that could lawfully try them for the alleged offense against the state, the United States may, in this case, in the district court of the United States, punish them *for the conspiracy charged,* precisely as the state could have punished them for the murder if the defendants had been previously found guilty of that crime in the state court."

(l.c. 483:)

"The lawful acquittal of the defendants of the charge of murder makes Sec. 5529 inapplicable in the present trial for conspiracy in the Federal Court. In other words, the Federal Court may proceed—the defendants having been lawfully acquitted in the state court of the crime of murdering Walker—just as if no such crime committed or alleged to have been committed by them in the act of violating the provisions of Sec. 5508."

We submit reincarnation of the Mason case resulted from *Malloy* v. *Hogan*, 84 S. Ct. 1489 and *Murphy* v. *Waterfront Commission of New York Harbor*, 84 S. Ct. 1594.

The alleged assault in question, if committed at all, was as a distinct offense, a crime against the State of Missouri, and petitioner here was acquitted of that crime by the Jackson County Circuit Court, the only tribunal having jurisdiction of it as an offense against the state.

CONCLUSION

Wherefore, Petitioner prays that a Writ of Certiorari issue under the seal of this Court to the United States Court of Appeals for the Eighth Circuit to the end that this case may be reversed outright, or if that may not be done that it be reversed and remanded for resentencing so as to relieve Petitioner of double punishment for a single offense.

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